Supreme Court of the United States.

No. 167.—October Term, 1902.

The Nashua Savings Bank, Petitioner, *vs.* The Anglo-American Land, Mortgage and Agency Company.	On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 16, 1903.]

This was an action by the defendant in error, a British corporation, in the Circuit Court for the District of New Hampshire, against the Nashua Savings Bank, a New Hampshire corporation, to recover an assessment made by such corporation in pursuance of its charter and by-laws, upon defendant's subscription to a thousand shares of its stock.

The case was tried before the Circuit Judge and a jury, and resulted in a verdict for the plaintiff by direction of the court, and a judgment against the bank in the sum of $7,131.10, which was affirmed on writ of error by the Circuit Court of Appeals. (108 Fed. Rep. 764.)

Mr. Justice Brown delivered the opinion of the Court.

The assessment in question had been made by the directors of the company, in pursuance of their amended articles of association, which declared that "the directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made upon him to the persons, and at the times and places appointed by the directors."

1. In order to prove the incorporation of the plaintiff company, as well as the liability and rights of the stockholders, the deposition of an attorney and solicitor of the Supreme Court of Judicature in England, who was also managing director of the plaintiff company, was read in evidence. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of Parliament, from 1862 to 1880, copies of which he produced and delivered to the commissioner, stating that these copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." To the admission of the statutes the defendant excepted upon the ground that they were not proved according to the established rules of law.

As these statutes were the basis of the plaintiff's corporate existence, and its right to bring this action, they must undoubtedly be proved as facts,

(*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445.) While it was stated by this court in the early case of *Church* v. *Hubbart*, (2 Cranch, 187, 238,) that foreign judgments are usually and most properly authenticated either by an exemplification under the great seal, by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated, the Circuit Court of the United States sitting in New Hampshire may, under R. S. sec. 721, declaring that "the laws of the several States," with certain exceptions, "shall be regarded as rules of decisions in trials at common law in the courts of the United States," receive such evidence of the authentication of foreign statutes as the practice of the courts in that State may authorize and justify, (*McNeil* v. *Holbrook*, 12 Pet. 84, 89; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 255; *Vance* v. *Campbell*, 1 Black, 427.) The "laws of the several States" with respect to evidence within the meaning of this section apply not only to the statutes but to the decisions of their highest courts. (*Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan* v. *Bindley*, 1 Wall. 66.)

The law of New Hampshire upon this subject appears to have been settled in *Hall* v. *Costello*, (48 N. H. 176,) in which an attorney, resident in New Hampshire, who had gone to Canada to investigate Canadian law, was permitted to state orally what he found the law to be, as embodied in the Queen's proclamation of neutrality. To same effect are *Barrows* v. *Downs*, (9 R. I. 446;) *Jones* v. *Maffett*, (5 S. & R. 523.) There is an even greater reason for permitting a local attorney, of thirty years' experience, who, as he states, was intimately acquainted with the English company or corporation laws, to produce as evidence of such laws copies of the statutes printed by authority of the English government, and used as proofs of statutes in the English courts.

It would appear that such authentication of foreign laws would be deemed sufficient in the English courts, as in *Lacon* v. *Higgins*, (3 Starkie, 178,) it was held that the French code was sufficiently proved by a witness—a French vice consul—who produced a book printed by authority of the French government, which the witness stated contained the French code, upon which he acted in his office as vice consul. In most, if not all, of the States of this Union statutes have been passed permitting laws of sister States to be proved simply by the production of a book containing what purports to be an authorized edition of such laws printed by State authority. (*Emery* v. *Berry*, 28 N. H. 473.) While the same liberality is not extended to foreign laws required to be proved as facts, it would seem like sticking in the bark to hold that a foreign expert might testify orally as to what such laws were, and not be able to produce what purports to be the official edition of such laws, and to testify as to the authenticity of such edition, and to the fact that it was received as evidence in

the domestic courts of that country. To the average mind it would seem as though there was much less liability to mistake in a printed copy of a statute from the official printer, than in a copy written and compared by an ordinary scrivener. The evidence was properly received.

2. Exception was also taken to the declaration, in that it contained no averment or allegation upon what conditions the plaintiff was authorized to make assessments. In this connection it is insisted that the declaration should have averred that such an assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; that it is also defective in that it contains no averment of notice of such assessment to defendant; or that defendant ever made an express promise to pay such assessment; and no direct allegation that defendant was a stockholder at the time the assessment was made. It appears, however, by the act of 25 and 26 Vic. chap. 89, "for the incorporation, regulation and winding up of trading companies and other associations," that the articles of association, "when registered, shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member of the company, in pursuance of the conditions and regulations, *shall be deemed a debt* due by such member to the company, and in England and Ireland in the nature of a specialty debt." It also appeared by the articles of association of the plaintiff corporation, No. 3, "that every person who has accepted any share or shares in this company, and whose name is entered in the registry of members, and no other person, shall be deemed to be a member." These regulations also contained the provision heretofore mentioned, that the directors might from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares. The board of directors is thus constituted a tribunal to determine when and to what amount assessments shall be made upon the unpaid shares of stock. By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation. (*Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527; *Relfe* v. *Rundle*, 103 U. S. 222.)

In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts. As was said by Mr. Justice Field in *Oglesby* v. *Attrill*, (105 U. S. 605, 609): "As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated, would justify the expenditure of the money to be raised.

They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful." (*Bailey* v. *Birkenhead &c. Railway Co.*, 12 Beav. 433; see also Cook on Stockholders, sec. 113; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329.) Whether such assessment could be impeached by showing that the corporation was not a *bona fide* enterprise, or had never actually engaged in business, or become a going concern, or that the assessment was made unnecessarily and in bad faith, or that a discrimination was made against foreign stockholders, it is unnecessary to determine, since no evidence to that effect was offered on behalf of the defendant. Certainly, under the cases above cited, it would be unnecessary in order to make a *prima facie* case to negative these facts. There is a presumption of good faith attaching as well to foreign as to domestic corporations.

The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit*, and no objection was made to the evidence offered upon the ground of variance. Under such circumstances, and without expressing an opinion as to the admissibility of the evidence offered, the declaration is good after verdict. In *Roberts* v. *Graham*, (6 Wall. 578,) we held that variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured. (*Patrick* v. *Graham*, 158 U. S. 33.)

The court in charging the jury in this case instructed them that there was no doubt the call for this assessment had been properly proved; that the only possible question which could have arisen was whether or not certain persons were directors of the corporation at the time of the call, and that as the amended articles of the association provided that calls might be made by the directors, there was no doubt that the call in question was properly made.

As the bill of exceptions contains nothing to indicate that the call was not properly made, and does not show that it contained *all* the evidence in the case, we should be at liberty, if the circumstances of the case required it, to infer that there was other evidence to supply any defect in respect to the legality of the call. (*Hansen* v. *Boyd*, 161 U. S. 397; *City* v. *Babcock*, 3 Wall. 240; *United States* v. *Patrick*, 73 Fed. Rep. 800.) The sufficiency of the evidence cannot be reviewed on writ of error. (*Generes* v. *Campbell*, 11 Wall. 193, 199; *Dower* v. *Richards*, 151 U. S. 658.)

It appears from the testimony of the secretary of the company that a notice of the call was posted up in a conspicuous place in the register's office of the company for more than a month before the call was payable, and in addition thereto a printed notice of the call was also forwarded to the defendant bank. This was a sufficient compliance with article 140 of the articles of association, which provides that "if any member resident out of

the United Kingdom neglect to give such address as is herebefore required, notice from him may be posted up in a conspicuous place in the register's office of the company, and for all the purposes of these regulations the register's office of the company shall be deemed to be the registered place of abode of such member."

3. A sale or forfeiture of defendant's shares was not a condition precedent to the right to recover this assessment. While a remedy by forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy.

4. Nor do we think there was any necessity of proving an express promise to pay this assessment. The English statute above quoted provides that all moneys payable by any member in pursuance of the articles of the company shall be deemed a *debt due by such member* of the company, and as this statute implies a promise to pay from a subscription to the shares, it clearly obviates the necessity of proving an express promise. (*Upton* v. *Tribilcock*, 91 U. S. 65; *Webster* v. *Upton*, 91 U. S. 65; *Chubb* v. *Upton*, 95 U. S. 665; *Howarth* v. *Lombard*, 175 Mass. 574.) Although the law of New Hampshire seems to be that in the absence of an express promise no personal action will lie, (*Shattuck* v. *Robbins*, 68 N. H. 585,) yet even there an obligation created by the charter is treated as the equivalent of an express promise. (Cook on Stockholders, sec. 71; *Anglo-American Co.* v. *Dyer*, 181 Mass. 593.)

There was no error in the action of the court below, and its judgment is therefore

Affirmed.

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Test:

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